

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT MONTGOMERY,

Plaintiff,

v.

SURGICAL CARE AFFILIATES, LLC,

Defendant.

Case No. 2:10-cv-1259-LDG (GWF)

ORDER

The plaintiff, Robert Montgomery, filed his complaint in state court alleging a claim that he was tortiously discharged in violation of public policy for pursuing a workers' compensation claim. The defendant, Surgical Care Affiliates, LLC, removed the matter pursuant to this Court's diversity jurisdiction. Montgomery timely moves to remand (#13) his complaint to state court pursuant to 28 U.S.C. §1447(c). He argues that his complaint was a civil action in state court arising under the workmen's compensation laws of the State, and thus was not removable pursuant to 28 U.S.C. §1445(c). Surgical Care opposes the motion, arguing that his claim for tortious discharge in violation of public policy is a judicially created action arising under Nevada's common law. The Court will deny the motion to remand, as a claim for tortious discharge in violation of public policy arises under Nevada common law, and not under Nevada's workers' compensation laws.

1 As Montgomery points out, a court in this district previously addressed the issue
2 whether a civil claim for being discharged in retaliation for pursuing a workers'
3 compensation claim arises under Nevada's workers' compensation laws. See, *Bearden v.*
4 *PNS Stores, Inc.*, 894 F.Supp. 1418 (D.Nev. 1995). Initially, the Court would note that it
5 does not agree with the parties that *Bearden* is persuasive, though not binding, authority on
6 the issue. While the court in *Bearden* addressed the issue, a review of the decision
7 establishes that its analysis and conclusion is dicta. Section 1447(c) provides for a 30-day
8 period in which "[a] motion to remand the case on the basis of any defect other than lack of
9 subject matter jurisdiction must be made." As the plaintiffs in *Bearden* filed their motion to
10 remand outside of this 30-day period, the threshold question was whether the plaintiffs
11 sought remand on the basis of a defect in subject matter jurisdiction. The court's
12 conclusion that the motion to remand pursuant to §1445(c) did not challenge a defect in
13 subject matter jurisdiction required denial of the untimely motion, regardless and without
14 consideration of the motion's merits. As such, the court's analysis of the merits of the
15 untimely motion was dicta unnecessary to the proper resolution of the motion.

16 Further, this Court does not agree with the dicta of *Bearden* that a claim for
17 retaliatory discharge arises under Nevada's workers' compensation laws. That court rested
18 its conclusion, in part, on its suggestion that "the right to be free from retaliatory discharge
19 is created under Nevada's workers' compensation statute." 894 F.Supp. at 1422. While
20 *Bearden* relied upon the Nevada Supreme Court's decision in *Hansen v. Harrah's*, 100
21 Nev. 60 (1984), the Nevada Supreme Court did *not* reason or suggest that the right to be
22 free from retaliatory discharge is created under Nevada's workers' compensation statutes
23 in *Hansen* or in any other decision. Rather, the Nevada Supreme Court recognized a claim
24 for retaliatory discharge even though the legislature had failed "to enact a statute expressly
25 forbidding retaliatory discharge for filing workmen's compensation claims." *Hansen*, 100
26 Nev. at 63.

1 Despite this language, the court in *Bearden* engaged in a rather lengthy analysis
 2 suggesting that retaliatory discharge was “clearly prohibited” pursuant to Nev. Rev. Stat.
 3 616B.609(1)(b)¹ even while acknowledging that the Nevada courts had *not* addressed the
 4 issue or defined whether the term “device,” as used in §616B.609(1)(b), encompassed the
 5 term “discharge.” Rather, the *Bearden* court reached its conclusion as to what the Nevada
 6 legislature had enacted in §616B.609(1)(b) by looking to the analysis of a similar
 7 Tennessee statute by the district court in the Western District of Tennessee. See,
 8 *Thompson v. Cort Furniture Rental Corp.*, 797 F.Supp. 618 (W.D.Tenn.,1992).
 9 Subsequent decisions of the Tennessee Supreme Court and the Sixth Circuit, see, *Nixon*
 10 *v. Waste Management, Inc.*, 156 Fed.Appx. 784 (6th Cir. 2005), preclude this Court from
 11 concluding that the *Thompson* court correctly construed Tennessee law to find that
 12 Tennessee’s cause of action for retaliatory discharge in violation of public policy arose from
 13 its analogous statute.

14 Contrary to the reasoning and suggestion in *Thompson*, the Tennessee Supreme
 15 Court, in *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn.1984), “observed, the
 16 [Tennessee] statute does not explicitly create a cause of action; it implies the existence of
 17 a right not to have workers' compensation benefits terminated by a wrongful discharge, but
 18 it does not establish any means of enforcing that right.” *Nixon*, 156 Fed.Appx. at 787. As
 19 further recognized in *Nixon*, “[i]f the cause of action were a creature of the workers'
 20 compensation law, moreover, it would have no application outside of the workers'
 21 compensation context.” *Nixon*, at 787. Rather, in Tennessee, an action for retaliatory
 22 discharge is available not only in the workers' compensation context, but wherever “the
 23 employer has violated a clear public policy evidenced by an unambiguous constitutional,
 24 statutory, or regulatory provision and the employer's violation was a substantial factor in the

25 ¹ At the time *Bearden* was decided, the relevant statute was codified at
 26 616.265. For clarity, this Court will refer to the statute as presently codified at §616B.609.

1 employee's discharge." *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823
2 (Tenn.1994).

3 Similar to the Sixth Circuit's reasoning in *Nixon*, this Court must conclude that
4 §616B.609(1)(b) neither clearly prohibits retaliatory discharge nor expressly or explicitly
5 creates any such right of action. Further, this Court must also conclude that Nevada's
6 Supreme Court, like Tennessee's Supreme Court, did not rest its conclusion that a cause
7 of action existed for discharge in violation of public policy on any provision of the workers'
8 compensation statutes. Rather than resting upon any definition or analysis of
9 §616B.609(1)(b), the Nevada Supreme Court in *Hansen* instead "elect[ed] to support the
10 established policy of this state concerning injured workmen and adopt the narrow exception
11 to the at-will employment rule recognizing that retaliatory discharge by an employer
12 stemming from the filing of a workmen's compensation claim by an injured employee is
13 actionable in tort." *Hansen*, 100 Nev. at 64 (emphasis added). In so doing, the Nevada
14 Supreme Court expressly recognized that "both the cause of action and the remedy are
15 governed by the law of torts." *Id.* (emphasis added).

16 Subsequently, in *Dillard Dep't Stores, Inc., v. Beckwith*, 115 Nev. 372 (2000), the
17 Nevada Supreme Court rejected an argument that the tort of retaliatory discharge in
18 violation of public policy did not survive the passage of Nev. Rev. Stat. 616D.030.² As the
19 Nevada Supreme Court stated in *Hansen*, "the at-will employment rule is subject to limited
20 exceptions founded upon strong public policy; and the failure of the legislature to enact a
21 statute expressly forbidding retaliatory discharge for filing workmen's compensation claims
22 does not preclude this Court from providing a remedy for what we conclude to be tortious
23 behavior." 100 Nev. at 63. As such, the Nevada Supreme Court not judicially recognized a
24 cause of action for retaliatory discharge in violation of public policy in *Hansen*, but further

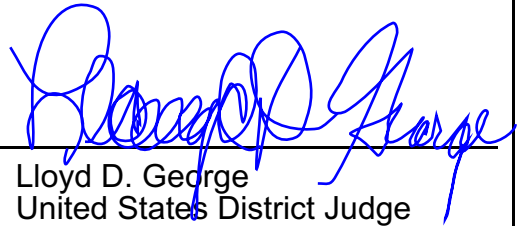
25 ² Section 616D.030 prohibits any cause of action arising from violations of the
26 workers' compensation statutes.

1 recognized this tort despite the "failure of the legislature to enact a statute expressly
2 forbidding retaliatory discharge."

3 As the tort of retaliatory discharge in violation of public policy is a common law claim
4 that exists whether or not such retaliatory discharge involves the filing or pursuing of a
5 workers' compensation claim, such tort does not arise under the laws of Nevada's workers'
6 compensation laws. That a claim for retaliatory discharge in violation of public policy can
7 be supported for a discharge in retaliation for filing or pursuing a workers' compensation
8 claim does not transform the claim into one arising under the workers' compensation laws.
9 Accordingly,

10 THE COURT **ORDERS** that Robert Montgomery's Motion to Remand (#13) is
11 DENIED.

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13 DATED this 27 day of January, 2011.

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16 Lloyd D. George
17 United States District Judge
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